The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

OMNI INNOVATIONS, LLC, a Washington limited liability company; JAMES S. GORDON, JR., a married individual,

Plaintiffs,

v.

INVIVA, INC., a Kentucky and Delaware corporation, d/b/a American Life Direct, and American Insurance Co. Of New York; and JOHN DOES, I-X,

Defendants.

NO. 06-cv-01537-JCC

DEFENDANT'S OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT

Note on Motion Calendar:
July 13, 2007

I. INTRODUCTION

Plaintiffs' "Motion for Partial Summary Judgment Permanently Enjoining Defendants from Sending Commercial Email to Plaintiff" (the "Motion") is frivolous. Plaintiffs cannot demonstrate either the irreparable harm necessary to grant injunctive relief, or the absence of issues of material fact necessary for summary judgment. Plaintiffs request injunctive relief pursuant to the CAN-SPAM Act of 2003, 15 U.S.C. § 7701 et seq. ("CAN-SPAM"), but this Court held Plaintiffs Gordon and Omni do not have standing to sue under CAN-SPAM in Gordon et al. v. Virtumundo et al., Case No. CV06-0204-JCC, W.D.Wash. (Coughenour, J.) ("Virtumundo"). Accordingly, the Court should deny the Motion.

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II. FACTS

A. Procedural History.

The instant lawsuit is in its nascent stages. The parties have not propounded written discovery requests and documents have not been exchanged. (Declaration of Derek Newman in Opposition to Motion for Partial Summary Judgment ("Newman Decl." at ¶2.) No depositions have been conducted. (Id.) Trial is scheduled for April 14, 2008. (Dkt. #9).

B. The plaintiffs already litigated the issues in this case in Virtumundo.

In Virtumundo, the same plaintiffs as in this case (Gordon and Omni) alleged violations of CAN-SPAM. (*See* Virtumundo, First Amended Complaint (Dkt. #15) ¶¶ 3.2, 3.3.) The defendants in Virtumundo won summary judgment dismissing all of Plaintiffs' claims. (*See* Virtumundo, Dkt. #121.) Specifically:

> [T]he Court [found] that Plaintiffs do not have CAN-SPAM standing.
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> *****
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> . . . even if there is some negligible burden to be inferred from the mere fact that unwanted e-mails have come to Plaintiffs' domain, it is clear to the Court that whatever harm might exist due to that inconvenience, it is not enough to establish the "adverse effect"intended by Congress.
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> *****
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> Plaintiffs also admit to *benefitting* from spam by way of their research endeavors and prolific litigation and settlements. This belies any suggestion that Plaintiffs are "bona fide Internet service providers" that have been "adversely affected" by spam. Instead, Plaintiffs' continued use of other people's e-mail addresses to collect spam and their undisputed ability to separate spam from other e-mails for generating lawsuit-fueled revenue directly contradicts any hint of adverse effect that otherwise might exist. Plaintiffs are not the type of entity that Congress intended to possess the limited private right of action it conferred on adversely affected bona fide Internet access service providers.

(Order at 13:15; Id. at 13:23-25; Id. at 15:9-14 (emphasis original).) [1]

Plaintiffs alleged the same statutory violations in Virtumundo as they do in this case. They also allege the violations occurred during the same time period in both

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[1] Plaintiffs appealed on June 15, 2007 (Gordon v. Virtumundo, Inc., No. 07-35487 (9th Cir.)).

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matters. In Virtumundo, Plaintiffs contended that email violations commenced in August 21, 2003 and continued until at least February 15, 2006. (Order at 2:19-3:2.) Plaintiffs' alleged damages in the present matter cover a substantially similar time period: commencing "from at least August 2003." Second Amended Complaint (Dkt. #11) at ¶ 7.

C. There are several disputed questions of material fact.

Plaintiffs claim it is "indisputable" that they have "received numerous commercial electronic mail messages... transmitted by, or on behalf of Defendants." (Motion at 2:17-18.) As evidence, they attach a single email which does not mention any defendant to this case. (Declaration of James S. Gordon, Jr. in Support of Plaintiffs' Motion for Partial Summary Judgment for Injunctive Relief ("Gordon Decl.", Dkt. # 20) ¶ 4 Ex. B.) That email purports to have been sent on behalf of "Spectrum Direct". (Id.) Plaintiffs claim, without evidence, that Inviva does business as Spectrum Direct. (Gordon Decl. ¶ 10.) However, Inviva did not send the email in question, and does not do business as Spectrum Direct. (Declaration of Robin Livingston in Opposition to Motion for Partial Summary Judgment ("Livingston Decl." at ¶2.)

Plaintiffs claim it is "indisputable that Gordon never wanted to receive spam from Defendants." (Motion at 2:19-20.) In truth, the record is incomplete whether Plaintiffs provided affirmative consent (i.e., "opted-in") to receive emails from Defendant or their affiliates. Plaintiffs acknowledge that the issue of whether Plaintiffs opted in has been a factual dispute in their prior litigation under CAN-SPAM. (*See* Motion at 6:10-16.) Indeed, Plaintiffs admitted in the past to opting in to receive commercial emails to create "spam traps" for litigation. This Court previously determined Plaintiffs are in the "spam business" and benefit from spam by "generating lawsuit-fueled revenue." (Order at 2:16-17; Id. at 15:13.)

Plaintiffs further allege that they properly unsubscribed to receiving emails from Defendant. The sole basis for this allegation is the Declaration of James Gordon Jr. and the exhibits thereto. (Dkt. # 20.) However, the declaration makes clear that Gordon did not unsubscribe in the manner provided in the email or other qualifying mechanism under

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15 U.S.C. § 7704(3). Rather, Plaintiffs unsubscribed in means and manner that they elected (*e.g.*, "Notice of Offer to Receive Unsolicited Commercial Email (SPAM)", Dkt. # 20-3), which the statute does not authorize.

Plaintiffs claim it is "indisputable" that they have "been adversely affected by the receipt of spam from Defendants". (Motion at 2:22-3:1.) This Court has previously expressed its disagreement with that position:

> Plaintiffs also admit to *benefitting* from spam by way of their research endeavors and prolific litigation and settlements. This belies any suggestion that Plaintiffs are "bona fide Internet service providers" that have been "adversely affected" by spam.

(Order at 15:9-14 (emphasis original).)

III. ARGUMENT AND AUTHORITY

A. Plaintiffs cannot meet the standard for summary judgment because there are disputed issues of material fact.

Summary judgment is proper only when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. See FED. R. CIV. P. 56(C). The party moving for summary judgment bears the burden of demonstrating the absence of a genuine issue of fact for trial. Franklin v. Fox, 312 F.3d 423, 438 (9th Cir. 2002) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). A genuine issue for trial exists if, on the basis of the evidence that was before the district court at the time of its ruling, the jury could reasonably find for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). All reasonable inferences from the evidence must be drawn in favor of the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). When the evidence yields conflicting inferences, summary judgment is improper, and the action must proceed to trial. Munger v. City of Glasgow Police Dep't, 227 F.3d 1082, 1087 (9th Cir. 2000). Summary judgment is proper if the only reasonable inference that can be drawn based on admissible evidence in the record is that Defendants have no basis for defending against Plaintiff's ACPA claims. Munger, 227 F.3d at 1087; see also, Connor v. Boeing N. Am., 311 F.3d 1139, 1150 (9th Cir.

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2002). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. See Thornhill Publ'g Co., Inc. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979).

The self-serving declaration of Plaintiff James Gordon does not raise a genuine issue of material fact. Plaintiffs can not establish an absence of material fact for each element of a CAN-SPAM violation. Plaintiffs have provided no evidence to show that the single email they submitted in support of the Motion was sent by the defendant or its agent.

Moreover, CAN-SPAM provides a safe haven for claims if the plaintiff has given his/her "affirmative consent" for the receipt of emails from the defendant. 15 USC § 7704(a)(4)(B) ("A prohibition in subparagraph (A) does not apply if there is affirmative consent by the recipient subsequent to the request under subparagraph (A)."). Plaintiffs cannot demonstrate that Defendant could not, after the conclusion of discovery, raise a genuine question of fact whether Plaintiffs provided affirmative consent to the receipt of emails from Defendant. Similarly, Plaintiffs cannot demonstrate that:

> (i) Plaintiffs "ma[de] a request using a mechanism provided pursuant to [§ 7704] paragraph (3)";
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> (ii) that Defendant failed to honor the request "more than 10 business days after the receipt of such request"; or
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> (iii) that Defendant had "actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that [an email] message falls within the scope of" a proper request to opt-out of future emails.

15 U.S.C. § 7704(d). The evidence in the record is wholly insufficient to satisfy Plaintiffs' burden on summary judgment.

B. Plaintiffs' claims are barred by collateral estoppel.

Plaintiffs do not have standing unless they qualify as "provider(s) of Internet access service" who are "adversely affected by a violation of section 7704 (a)(1), (b), or (d) of [the Act], or a pattern or practice that violates paragraph (2), (3), (4), or (5) of section 7704 (a)." 15 U.S.C. § 7706(g)(1) (emphasis added). This Court found in Virtumundo that Plaintiffs were not adversely affected by emails during the period

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applicable to this lawsuit. Such finding is dispositive in the instant motion under the doctrine of collateral estoppel/issue preclusion.

"Collateral estoppel" or "offensive nonmutual issue preclusion" prevents a party from relitigating an issue that the party has litigated and lost. *See* Catholic Social Servs., Inc. v. I.N.S., 232 F.3d 1139, 1152 (9th Cir. 2000). In the Ninth Circuit, the application of "offensive nonmutual issue preclusion" is appropriate if:

> 1. there was a full and fair opportunity to litigate the identical issue in the prior action, *see* Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1399 (9th Cir. 1992); Resolution Trust Corp. v. Keating, 186 F.3d 1110, 1114 (9th Cir. 1999); Appling v. State Farm Mut. Auto Ins. Co., 340 F.3d 769, 775 (9th Cir. 2003);
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> 2. the issue was actually litigated in the prior action, *see* Appling, 340 F.3d at 775;
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> 3. the issue was decided in a final judgment, *see* Resolution Trust Corp., 186 F.3d at 1114; and
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> 4. the party against whom issue preclusion is asserted was a party or in privity with a party to the prior action, *see* id.

See also Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 (9th Cir. 2006); Robi v. Five Platters, Inc., 838 F.2d 318, 322 (9th Cir. 1988).

The Court's finding that Plaintiffs were not adversely affected by emails during the subject period meets the Ninth Circuit's test for offensive nonmutual issue preclusion. First, Plaintiffs had a full and fair opportunity to litigate the identical issue in Virtumundo. Second, the issue of adverse effect was litigated and was the basis for the Court's ruling. Third, final judgment was entered in favor of Virtumundo and the other defendants. *See* Virtumundo at Dkt. # 122. Finally, Plaintiffs are the identical parties to the Virtumundo action.

C. Plaintiffs do not meet the standard for injunctive relief because they did not suffer irreparable harm.

According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief, and in particular:

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(1) that it has suffered an irreparable injury;

(2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury;

(3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and

(4) that the public interest would not be disserved by a permanent injunction.

eBay Inc. v. MercExchange, L.L.C., 126 S. Ct. 1837, 1839 (2006).

In light of the judicial finding that Plaintiffs were not adversely affected, it is clear that Plaintiffs cannot meet the heightened standard necessary for issuing injunctive relief. Injunctive relief requires that Plaintiffs demonstrate, amongst other things, that they have suffered irreparable harm. Plaintiffs fall grossly short of meeting that standard. The finding that Plaintiffs have not been adversely affected leads to the conclusion that, *a fortiori*, Plaintiffs have not been irreparably harmed.

Nor have Plaintiffs made a showing that money damages are not adequate to compensate them. Plaintiffs admitted in Virtumundo that they suffered no actual damages, yet they sought tens of millions of dollars. The statutory damages they seek in this case will more than compensate them for any harm they incurred as a result of receiving an email.

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IV. CONCLUSION

The plaintiffs filed the instant motion without a basis in law or fact, and did not meet the standard set forth in FED. R. CIV. P. 11. They present no evidence indicating there are any undisputed issues of material fact, and indeed there are many issues in dispute in this case. Plaintiffs fail to meet the standard for injunctive relief, including irreparable harm and that money damages would be insufficient to compensate them. Finally, Plaintiff's claims are barred by collateral estoppel. Therefore, the Court should deny the Motion.

DATED this 9th day of July, 2007.

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